

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JANE KAO fka JANE RASHAD
Debtor

§
§
§

Case No. 15-31193-H3-13

Chapter 13

**REPLY OF J. MICHAEL KELLY TO MARK ROSETTA'S
"MOTION TO RECONSIDER COURT'S PERMISSION
TO LIFT BANKRUPTCY STAY."**

TO THE HONORABLE UNITED STATES BANKRUPTCY JUDGE:

COMES NOW, J. Michael Kelly ("Kelly"), a creditor of Jane Kao, fka Jane Rashad ("the Debtor") and would respectfully show the Court as follows:

1. On December 21, 2015 the Court entered a Judgment granting Kelly's Motion for Relief from the Automatic Stay regarding non-exempt property (ECF #67). The Judgment further provided that the Automatic Stay was lifted so as to allow Kelly to continue prosecution of the Lawsuit styled *J. Michael Kelly v. Jane Rashad aka Jane Kao et al*, No. BC558690, pending in the Superior Court of Los Angeles County.

2. On January 4, 2016, Mark Rosetta ("Rosetta") filed a "Motion to Reconsider Court's Permission to Lift Bankruptcy Stay" (ECF #137). Rosetta's Motion to Reconsider was brought pursuant to Fed. R. Bankr. P. 9023 and 9024. Neither Rule justifies setting aside the Court's Judgment, as shown below.

FEDERAL RULE OF BANKRUPTCY PROCEDURE 9023

3. Fed. R. Bankr. P. 9023 provides that Federal Rule of Civil Procedure 59 applies in cases under the Bankruptcy Code. *Rule 59 F.R. Civ. P* permits a party to file a motion for new trial no later than 28 days after entry of judgment. The 28 day period to file the Motion to

Reconsider is shortened to 14 days in bankruptcy court pursuant to Fed. R. Bankr. P. 9023 to correspond to the deadline to file a notice of appeal under Fed. R. Bankr. P. 8002(a).

4. Rosetta's Motion to Reconsider does not allege newly discovered evidence or errors of fact or law. What Rosetta urges instead are arguments that the Court has heard many times and considered and rejected in many contexts.

FEDERAL RULE OF CIVIL PROCEDURE 60

5. Fed. R. Bankr. P. 9024 provides that Federal Rule of Civil Procedure 60 is adopted in bankruptcy court with a few differences. Rule 60 allows the Court to relieve a party from a final judgment or order for one of the six reasons listed in the Rule. A motion filed under Rule 60 cannot be used to vacate a judgment or order absent one of the grounds listed in the Rule and none of those grounds made it into Rosetta's Motion.

STANDING

6. Standing is a jurisdictional requirement that cannot be waived and does not appear to be satisfied by Rosetta's Motion for Reconsideration. In bankruptcy proceedings, only a "party in interest" has standing. Although "party in interest" is not defined in the Bankruptcy Code its meaning is ascertainable. For example, Section 1109 of the Bankruptcy Code provides that a "party in interest in a Chapter 11 case includes the "debtor, the trustee, a creditors' committee . . . a creditor, an equity security holder, or any indenture trustee." 11 U.S.C. §1109.

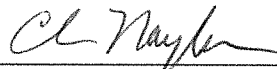
In order for Rosetta to have standing, he must be a "creditor." "Creditor" is a term defined by the Bankruptcy Code. Section 101(10) of the Bankruptcy Code defines "creditor" to mean:

- (A) entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor;
- (B) entity that has a claim against the estate of a kind specified in section 348(d) 502(f), 502(g), 502(h) or 502(i) of this title; or
- (C) entity that has a community claim.

It does not appear that Rosetta is a creditor. Rosetta has not filed a proof of claim according to the Claims Register in this case. The deadline for filing a claim passed on August 11, 2015. Rosetta's lack of claim against the Debtor means that he is not a creditor and thus, not a party interest. Since he is not a party in interest, Rosetta does not have standing to bring the Motion to Reconsider.

Wherefore, Premises Considered, J. Michael Kelly prays that the Motion for Reconsideration filed by Mark Rosetta be denied and for all other relief, both legal and equitable to which J. Michael Kelly is entitled.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 18 day of January, 2016, true and correct copies of the above and foregoing Reply To Motion to Reconsider Court's Permission to Lift Bankruptcy Stay.



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